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New York Ave., LLC, a Utah Limited Liability Company, Plaintiff and Appellee, and Cross-Appellant, v. David D. Harrison, and Individual, and Jan C. Harrison, and Individual, Defendants and Appellants, and Cross-Appellees : Brief of Appellant and Cross-Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**NEW YORK AVE., LLC, A Utah
limited liability company,**

**Plaintiff, Appellee, and
Cross-Appellant,**

v.

**DAVID D. HARRISON, an individual,
and JAN C. HARRISON, an individual,**

**Defendants, Appellants,
and Cross-Appellees.**

Appellate Case No.: 20140719-SC

**(Appeal from the Fourth District
Court Case No. 090402295
Judge David Mortensen)**

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INTRODUCTION

NYA, through its conditional offer of the Disputed Extension Payment, sought to rewrite the terms of the REPC to make a better bargain than it negotiated. The letter accompanying the Disputed Extension Payment required the Harrisons to agree to NYA's purpose and expectation in entering the REPC, which included novel terms located nowhere in the express terms of the REPC that were at odds with the Harrisons' purpose and expectations. In spite of the disputed interpretation of the REPC, the Harrisons remained willing to sell the Property to NYA, and notified NYA of their willingness in writing.

But NYA no longer wanted to purchase the Property. The real estate market had softened, so, through this litigation and the Disputed Extension Payment, NYA sought a refund of its money and an exit from its contractual obligation to purchase the Property. NYA's behavior was a violation of the covenant of good faith and fair dealing and based on a faulty rejection of *any* "reasonable time" to close on the purchase of the Property. The Harrisons' rejection of the Disputed Extension Payment was a proper rejection of NYA's attempt to modify the express terms of the contract, and the district court erred in concluding that rejection was a material breach of the REPC, especially given NYA's continued willingness to sell the Property.

In its opposition, NYA claims that the Harrisons want the Court to rewrite the terms of a bad bargain. But NYA fails to address key case law concerning the obligations of contracting parties when a contract expressly grants discretion to one side. Rather than seeking to add terms to the REPC, the Harrisons merely want this Court to

uphold and affirm decades of case law requiring NYA to exercise the broad grant of discretion given to it under the REPC consistent with the parties' justified expectations, including closing within a reasonable time. Even if the Court somehow disagrees with the Harrisons' interpretation of the REPC, the Court should reject NYA's attempt to force its own interpretation of the REPC down the Harrisons' throat, an action which in itself was a violation of the covenant of good faith and fair dealing. NYA's conditional payment was not valid tender of NYA's August Extension Payment. And even if the conditionally offered Disputed Extension Payment did constitute valid tender, the Harrisons' rejection of that tender was not a material breach of the REPC, an argument fully briefed and preserved in the Harrisons' motion to reconsider. The Court should reject NYA's bully tactics and reverse the district court's holding that the Harrisons' rejection of the Disputed Extension Payment constituted a breach of the REPC excusing further performance by NYA.

The Court should similarly reject NYA's nitpicking arguments about attorney fees and prejudgment interest. The Court need not decide these issues because NYA is entitled to no damages or fees because it breached the REPC by failing to tender extension payments and failing to purchase the Property. If the Court reaches the attorney fees and prejudgment interest issues, it should affirm the district court's exercise of its discretion to determine the reasonableness of NYA's fees. The Court should also uphold the district court's ruling that prejudgment interest accrues from the time of the alleged breach.

ARGUMENT

I. NYA HAD NO CONTRACTUAL RIGHT TO DELAY CLOSING INDEFINITELY

NYA incorrectly argues that a grant of “sole discretion” in the addendum to the REPC is an express contractual right to extend closing for any reason whatsoever for as long as it deems necessary, thus limiting the application of the covenant of good faith and fair dealing. It also appears to argue, for the first time, that the justified expectation of the parties was that NYA was purchasing the Property for development, and that this understanding extended unfettered discretion to NYA with respect to the extensions so long as it was attempting to develop the Property. Both arguments are in error.

The Harrisons do not seek a ruling that establishes a new right, is inconsistent with express contractual terms, or would require NYA to act to its own detriment to benefit the Harrisons. *See Markham v. Bradley*, 2007 UT App 379, ¶ 19, 173 P.3d 865 (explaining limitations on the covenant of good faith and fair dealing). Rather, the Harrisons argue that NYA was required to exercise its “sole discretion” to extend the settlement deadline “consistent with the agreed common purpose and the justified expectations of the other party.” *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 43, 104 P.3d 1226. The justified expectations of the parties here were that NYA would purchase the Property, and not that the parties would enter into a lop-sided option agreement or seller-financed transaction. To the extent the parties understood that NYA would purchase the Property for development purposes, NYA violated the covenant of good faith and fair dealing for failing to take any steps whatsoever to develop the Property between early

2008 at the time it stopped making Extension Payments. NYA also violated the covenant of good faith and fair dealing with its attempt to bully the Harrisons into accepting its disputed interpretation of the REPC. Accordingly, the Court should reverse the district court's ruling that NYA could extend settlement an unlimited number of times without violating the covenant of good faith and fair dealing.

A. The Covenant of Good Faith and Fair Dealing Does Not Modify Existing Contractual Rights or Establish New Rights

“[E]ven express contractual rights must be exercised reasonably and in good faith.” *Cook Assocs., Inc. v. Utah Sch. & Institutional Trust Lands Admin.*, 2010 UT App 284, ¶ 27, 243 P.3d 888; *see also Alpha Partners, Inc. v. Transamerica Inv. Mgmt.*, LLC 2006 UT App 331, ¶ 23, 153 P.3d 714. Utah Courts have consistently held that the requirement to act in good faith does not modify express contractual terms, even while expressly limiting a party's unfettered exercise of its contractual rights. For instance, in *Cook Assocs.*, this Court held that even though SITLA had an express, unambiguous contractual right to “adjust the rental rate every five years as SITLA deems necessary in the best interest of the State,” it was not automatically permitted to increase drastically the rent obligations in a way that deprived the lessee of the benefit of the Lease. *Cook Assocs.*, 2010 UT App 284, ¶¶ 27-29. Similarly, in *Alpha Partners*, this Court held that even though the plaintiff had an express contractual right to vary fees “20% above or below the estimates stated in” the contract, any variance in fee must be consistent with the covenant of good faith and fair dealing. *Alpha Partners*, 2006 UT App 331, ¶¶ 22-23 (“Interpreting the contract to permit additional fees based solely on the whim of

[plaintiff] would be inequitable and would produce an absurd result.”). In neither of these cases was the Court making a better bargain for the parties than they made for themselves. Rather, the Court required that the party with discretion behave consistent with the parties’ justified expectations when exercising express contractual rights.

NYA cites *Brown v. Moore* in support of its argument that a reasonable time to close on the Property is inconsistent with and in addition to the express terms of the REPC. In *Brown*, the defendant met its “only express contractual obligation,” and was not required to permit plaintiff “to recover their investment” before exercising its contractual right to take over plaintiff’s business. 973 P.2d 950, 954 (Utah 1998). The Utah Supreme Court held that the covenant of good faith and fair dealing could not be read to add terms not related to an “express obligation” of either party. *Id.* In contrast, here NYA had an express contractual obligation to purchase the Property, and was required to comply with its express contractual obligation in good faith.

NYA was required to exercise its express contractual right to extend the settlement deadline in compliance with the covenant of good faith and fair dealing. When it failed to purchase the Property in a reasonable time, it violated the covenant. Moreover, even if NYA was ultimately right that it was entitled to extend the settlement deadline indefinitely, or at least until it was “feasible” to develop the property to its “maximum potential,” the conditional tender was a violation of the covenant of good faith and fair dealing because it prevented the Harrisons from continuing to accept extension payments unless they were willing to forego their claims against NYA. Accordingly, the Court

should reverse the district court's denial of summary judgment to the Harrisons on this issue.

B. NYA Did Not Exercise Its "Sole Discretion" in Good Faith

The REPC's grant of "sole discretion" to NYA required NYA to exercise that discretion consistent with the justified expectations of the parties. Neither party to a contract—but especially a party with an explicit grant of discretion—may "do anything to injure the other party's rights to receive the benefits of the contract." *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 14, 94 P.3d 193; *see also Markham*, 2007 UT App 379, ¶ 18; *Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶ 19, 84 P.3d 1154; *Cook Assocs.* 2010 UT App 284, ¶ 27. Exercise of discretion that renders the performance of the other party "difficult or impossible" is also a violation of the covenant of good faith and fair dealing. *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792, 797-98 (Utah Ct. App. 1997).

NYA argues that the contractual requirement of an additional \$6,250 earnest money payment to extend the settlement for 30 days constitutes an express limit on NYA's discretion to extend the contract thereby negating the covenant of good faith and fair dealing as to the extension of the settlement deadline. However, the covenant of good faith and fair dealing does not evaporate merely because there is some contractual limit on the exercise of discretion. *Eggett*, 2004 UT 28, ¶ 17. Rather, "the degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on contract terms." *Id* ¶ 16. While an express term may have an impact on how the

Court interprets a “reasonable” time for performance, it does not eliminate the covenant of good faith and fair dealing. For instance, in *Eggett*, the defendant argued that it could not have breached the covenant of good faith and fair dealing because it valued the plaintiff’s business using GAAP, as specified by an express term of the contract between the parties. 2004 UT 28, ¶ 17. The Utah Supreme Court disagreed, holding that because defendant “had the opportunity to employ some discretion in its use of GAAP,” it was required to exercise that discretion in a way that would artificially depress the book value of the company. *Id.*; see also *Alpha Partners, Inc.*, 2006 UT App 331, ¶ 23. Similarly here, NYA argues that any application of the covenant of good faith and fair dealing would eviscerate its contractual right to extend the settlement deadline at its “sole discretion.” But a specific contractual term with implicit discretion, such as the application of GAAP in *Eggett* or the unspecified date for performance here, requires more, not less, application of the covenant of good faith and fair dealing to protect the vulnerable party from an inappropriate use of discretion.

Accordingly, NYA was permitted to extend the settlement deadline, so long as it did so consistent with the parties’ expectation that the Real Estate *Purchase* Agreement was a purchase agreement and that NYA would, in a reasonable time, purchase the Property.

C. NYA Did Not Act Consistently With the Justified Expectation of the Parties

For the first time in briefing this issue, NYA appears to argue that the justified expectation of the parties was that NYA would purchase the Property only when it was

feasible to develop it. However, the undisputed facts demonstrate that regardless of whether the Harrisons were aware of an intent by NYA to develop the Property, the Harrisons at all times considered the REPC to be a purchase contract that would be performed within a short period of time. (Aplt. Br. at Factual Background ¶¶ 1-16.) Additionally, if the purpose of the REPC was to enable NYA to develop the Property, NYA violated the covenant of good faith and fair dealing by failing to take any steps to arrange for the development of the Property for an entire year before the Harrisons requested it comply with its obligation to purchase the Property, and eighteen months before the date Harrisons deemed reasonable for NYA to close.

None of the provisions of the REPC NYA cites support the argument that the Harrisons' justified expectation was that NYA could extend settlement indefinitely to accomplish maximum development of the Property. NYA cites to paragraph 1.2 of the REPC, paragraphs 2, 7, and 8 of Addendum 1, and paragraph 1 of Addendum 2. Paragraph 1.2 of the REPC and paragraph 1 of Addendum 2 both relate to water rights. In Paragraph 1.2 of the REPC, NYA requests "[a]ll water rights attached to property and necessary for development." In paragraph 1 of Addendum 2, the Harrisons agreed to transfer 20.27 water shares to the City of Springville "per their requirement for Buyer's proposed development." Addendum 1 paragraph 2 permits NYA to conduct broad due diligence "to determine that the property is satisfactory for Buyer's intended use." Paragraphs 7 and 8 provide that the Harrisons would "sign within a reasonable time period all pertinent applications and documents required for governmental approval of

Buyer's proposed development"¹ and that they will provide access to the Property to Buyer "for any testing, inspections, surveying, and other similar services for developing the Property. While these provisions show that the Harrisons were generally aware that NYA planned to develop the Property (which they have never disputed), they do not demonstrate that the Harrisons intended that NYA could hold the Property under contract indefinitely while it waited for it to become "economically feasible" to develop the Property to its "maximum potential."

On the contrary, as set forth in the Harrisons' statement of facts and corresponding record cites, NYA owner Steve Kelly assured the Harrisons that he intended to close on the Property within a short period of time. (Aplt. Br. at Factual Background ¶¶ 10-12.) Nothing in the communications between the parties indicates that either side believed the transaction was based on the economic feasibility and cost of development. (*See* Real Estate Purchase Contract("REPC"), attached to Aplt. Addendum as Exhibit 4; Addendum 1 to REPC, attached to Aplt. Addendum as Exhibit 5; Addendum 2 to REPC, attached to Aplt. Addendum as Exhibit 6; R. 149-52.) Further, the undisputed facts establish that NYA ceased making any effort to develop the Property by early 2008. (Aplt. Br. at Factual Background ¶¶ 13-14.) Nonetheless, it wasn't until a year later that the Harrisons requested that NYA close in a reasonable amount of time. (*Id.* ¶ 15.)

If it is true that the justified expectations of the parties were that NYA would develop the Property, it breached the covenant of good faith and fair dealing by failing to

¹ The requirement that the Harrisons act expeditiously indicates an intent on NYA's part to close within a reasonable time.

pursue development. *See PDQ Center, Inc. v. Huber*, 949 P.2d 792 (Utah Ct. App. 1997). In *PDQ Lube Ctr.*, this Court held that the plaintiff violated the covenant of good faith and fair dealing when he failed to comply with his obligations under a purchase contract within a reasonable time, intending to “kill the deal” with his delay, which deprived defendant of the benefit of the bargain. Similarly here, NYA hoped to either “kill the deal” with its indefinite delay or to exact an interest-free loan from the Harrisons while it rode out the market downturn. Because there is no dispute that NYA did nothing to develop the Property for at least eighteen months before the Disputed Extension Payment, this Court should rule that it violated the covenant of good faith and fair dealing as a matter of law.

II. THE REPC DID NOT SPECIFY A TIME FOR PERFORMANCE AND NYA FAILED TO CLOSE WITHIN A REASONABLE TIME

A contract without a specified time for performance must be completed “within a reasonable time under the circumstances.” *Richins Drilling, Inc. v. Golf Servs Grp, Inc.*, 2008 UT App 262, ¶ 5, 189 P.3d 1280. “What constitutes a reasonable time depends upon the subject matter, the nature of the act to be performed, and the situation of the parties.” *Salt Lake City v. State*, 125 P.2d 790, 793 (Utah 1942).

NYA claims that because the REPC permitted “an unlimited number” of extensions of the settlement deadline, that the REPC specified a time for performance of $x + 30$, and the Court may not read a reasonableness limitation into the REPC. But an unlimited number of extensions, by definition, does not provide a definite time for NYA to purchase the Property, as it promised to do in the REPC. Additionally, the undisputed

facts show that NYA failed to close within a reasonable time as a matter of law.

Accordingly, this Court should reverse the district court's ruling that NYA was not required to close within a "reasonable time" and hold that NYA breached the REPC by failing to close.

A. The REPC Did Not Specify a Time for Performance

The REPC here is silent on the time for performance. Although it permits NYA to extend the settlement deadline at its "sole discretion" it does not include the essential term of how many extensions are permitted under the contract. Under such circumstances, the Court can supply a reasonable time for performance. *Richins Drilling, Inc.*, 2008 UT App 262, ¶ 5. It is important for the Court to supply this essential term: to accept NYA's interpretation means that under the REPC, NYA would be permitted to pay \$6250 per month in interest-free extension payments for forty years until the entire purchase price had been paid.² The Court should avoid contract construction that leads to an "absurd" result. *See Okelberry v. W. Daniels Land Assoc.*, 2005 UT App 327, ¶ 24, 120 P.3d 34 (declining to interpret a contract in a manner that could lead to absurd results).

NYA cites *Hidden Meadows Development Co. v. Mills* to support its argument that the Court should not supply a reasonable time term to the REPC. In *Hidden Meadows*, neither party argued that the option contract at issue needed to be performed within a reasonable time. 511 P.2d 737 (Utah 1973). Rather, the parties disputed the effective

² Defendants are an elderly couple. Defendant Jan Harrison passed away during this litigation. Considering the advanced age and ailing health of the Defendants, they could not have possibly intended for the contract to extend interest-free for forty years.

date of cancellation of the option under the terms of the contract. *Id.* at 471. The Utah Supreme Court declined to invalidate the agreement for vagueness, holding that the terms of renewing the option were “clear, certain, definite, and unambiguous.” *Id.* at 472.

However, *Hidden Meadows* pertained to an option contract, not a purchase contract, that permitted cancellation by either party under the express terms of the contract. Not only was the reasonableness of the time for performance not at issue in the case, it would not have been at issue given that either party had equal discretion to terminate the option contract under equal terms. Accordingly, this case has no bearing on whether the Court should read a reasonable time for performance into the REPC.

Because there is no definite settlement deadline specified in the contract, NYA was required to close in a reasonable time, and breached the contract when it failed to purchase the Property.

B. Based on the Undisputed Facts, NYA Failed to Close in a Reasonable Time

NYA claims that the Court cannot rule that it failed to close within a reasonable time as a matter of law. But Utah case law is clear: when the facts are undisputed, a reasonable time for performance can be decided as a matter of law. *Salt Lake City v. State*, 125 P.2d 790, 793 (Utah 1942); *see also IHC Health Servs. v. D&K Mgmt.*, 2008 UT 73 ¶ 19, 196 P.3d 588 (holding plaintiff did not waive its rights as a matter of law because the pertinent facts were undisputed). When a contract does not contain a definite time for performance, the party seeking performance in a reasonable time must give sufficient notice to the other party to enable it to perform. *See, e.g. Tanner v.*

Baadsgaard, 612 P.2d 345, 347 (Utah 1980) (holding that where there was no definite time to perform, “the seller must give notice and a reasonable time to perform before he may insist upon holding the buyer strictly to the time requirements.”); *Adair v. Bracken*, 745 P.2d 849, 853 (Utah Ct. App. 1987).

NYA argues that the “limited facts” supporting that it failed to close within a reasonable time are subject to dispute. Specifically, it claims that the original closing date, communications between the parties during the pendency of the contract, NYA’s failure to terminate the contract during the due diligence period, and the five-month period of time offered by the Harrisons for NYA to procure financing to close on the Property are not relevant to a determination of a reasonable time. But NYA does not set forth any opposing facts tending to show that August 2009 was an unreasonable amount of time for it to close. Its only attempt to do so is a false claim that the contract was “dependent on development of the property,” (Aplee. Br. at 30), which is at odds with the express terms of the REPC. Because the facts relating to reasonableness are undisputed, the Court should rule as a matter of law that NYA failed to close within a reasonable time.

III. NYA DID NOT TENDER THE DISPUTED EXTENSION PAYMENT AND THE HARRISONS DID NOT BREACH THE AGREEMENT

NYA argues that the letter accompanying the Disputed Extension Payment did not add any additional terms to the contract and therefore was not conditional tender. “In order to be valid, tender of payment on a contract must be (1) timely, (2) made to the person entitled to payment, (3) unconditional, (4) an offer to pay the amount of money

due, and (5) coupled with an actual production of the money or its equivalent.” *Brady v. Park*, 2013 UT App 97, ¶ 45, 302 P.3d 1220. Accepting conditional tender means waiving any objection to the terms under which the tender is offered. Utah Code Ann. § 78B-5-802.

NYA argues that its tender merely demanded performance and agreement to terms the Harrisons had already agreed. In support, it points to a disclaimer in the letter accompanying the Disputed Extension Payment which states that “Nothing in this letter should be construed as a demand by my clients for any rights or benefits other than those provided under the REPC.” However, the terms in the letter required the Harrisons to agree to terms that were not contained in the REPC and would have modified the covenant of good faith and fair dealing. Most notably, the letter required the Harrisons to agree that

The REPC could be extended, at [NYA’s] discretion . . . to allow for the property to be developed to its full potential. This includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and property being economically feasible to develop under zoning ordinances of Springville City and existing market conditions.

(R. 116-17.) There are no terms in the REPC that permit NYA to extend closing indefinitely to permit development of the Property to its “full potential.” NYA did not object to the sewer line or storm drainage during the due diligence period. It constantly assured the Harrisons that closing would take place in the not-too-distant future. Had the Harrisons agreed to NYA’s terms, it would have given up substantial contract rights, including the right to insist on performance within a reasonable time and a right to insist that NYA exercise its express contract rights consistent with the parties’ justified

expectations. Therefore, the tender of the Disputed Extension Payment added terms to the parties' previous agreement, was conditional on the acceptance of those terms, and was not valid.

NYA argues that the Harrisons misconstrue the holding in *Century 21 All Western Real Estate & Inv. v. Webb*. In *Century 21*, the Utah Supreme Court held that a letter from the buyer indicating he was ready, willing, and able to close was not sufficient tender because "of the buyers' insistence" that the seller comply with a term not expressly stated in the purchase contract. 645 P.2d 52, 56 (Utah 1982). That is exactly what NYA did with its letter accompanying the Disputed Extension Payment. Accordingly, the Court should hold that the Disputed Extension Payment was not valid tender and that NYA breached the REPC by failing to make the Disputed Extension Payment or any Extension Payment thereafter due, and failing to close on the Property within thirty days of the previous extension payment.

IV. ANY BREACH BY THE HARRISONS WAS IMMATERIAL

The Harrisons' supposed breach of the REPC by rejecting the Disputed Extension Payment was not material as a matter of law. This issue was properly preserved in the district court, and if it was not, should still be considered because the district court's failure to consider materiality was plain error.

A. Rejecting the Disputed Extension Payment Did Not Breach the REPC

NYA claims that the Harrisons' rejection of the Disputed Extension Payment breached the REPC, but it ignores the fact that the Harrisons at all times remained willing to sell the Property to NYA, which was their obligation under the REPC. It is true that

the Harrisons have always maintained the position that a failure to make the August Extension Payment was a breach of the REPC, but the Harrisons never stated that they would not sell the Property to NYA. In fact, in the September 2 Response specifically states that in spite of NYA's failure to make the August Extension Payment, the Harrisons would "continue to accept the monthly checks so long as [NYA withdrew its] inappropriate conditions." (Letter from J. Boren to K. Kelly, Sept. 2, 2009, a copy of which is attached to Aplt. Addendum as Exhibit 9.) They further indicated that it would be willing to negotiate a reasonable time to for closing. *Id.*

NYA also takes issue with the Harrisons' cites to the law of anticipatory breach rather than actual breach. NYA does not dispute that the Harrisons at all times were willing to sell the Property to NYA. Rather, it claims that the Harrisons were contractually obligated to accept the Disputed Extension Payment, and actually breached the contract when they refused it. But the Harrisons' obligation under the REPC was to sell the Property to NYA, an obligation they did not disclaim even after NYA breached the REPC by failing to make the Disputed Extension Payment. Therefore, the Harrisons did not anticipatorily or actually breach the contract. Even if the rejection of the Disputed Extension Payment could be construed as a breach of the REPC under these circumstances, it was not a material breach excusing NYA's further performance.

B. Rejection of the Disputed Extension Payment Was Not a Material Breach

NYA cites no authority for its bald assertion that the Harrisons are "wrong" about the lack of materiality of their supposed breach. (*See Aplee. Br. at 37.*) That is because it

cannot. Only a **material** breach excuses the performance of another party. *Cross v. Olsen*, 2013 UT App 135, ¶ 26, 303 P.3d 1030. As set forth in the Harrisons' opening brief, the district court considers certain factors in determining whether a breach is material. (Aplt. Br. at 23-24.) NYA does not specifically address those factors. Instead, it argues, without any cite to the record, that "[t]he settlement date and the right to extend it were substantial and material provisions of and crucial components of the REPC." (Aplee. Br. at 37.) However, it does not follow that by rejecting the Disputed Extension Payment that NYA would be deprived of its right to extend settlement to the extent the REPC permits such extension. At the time the Harrisons rejected the Disputed Extension Payment, the parties were engaged in litigation to determine the legally correct interpretation of the REPC. NYA has presented no evidence, because none exists, that the Harrisons would not have abided by a court ruling that NYA was entitled to unlimited extensions under the REPC. For this reason and the reasons set forth in the Harrisons opening brief, rejection of the Disputed Extension Payment cannot be considered a material breach excusing further performance by NYA.

C. The Harrisons Adequately Preserved Their Materiality Argument

Rather than fully responding to the Harrisons' argument on the materiality of their supposed breach, NYA relies on its claim that the materiality of the breach was not preserved. "An issue is preserved if it is raised in a timely fashion, clearly identified, and adequately briefed." *Normandeau v. Hanson Equipment, Inc.*, 2009 UT 44, ¶ 23, 215 P.3d 152. This means issues must be (1) "raised in a timely fashion," (2) "specifically raised, and (3) the challenging party must introduce . . . relevant legal authority." 438

Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801. Here, the Harrisons stated in their briefing on their motion to reconsider that “[d]eclining to accept conditional tender under [the circumstances of the Disputed Extension Payment] cannot be a material breach of the REPC.” (R. 665, 670.) The Harrisons went on to explain that

“[O]ne party’s breach excuses further performance by the non-breaching party **if the breach is material.**” *Orlob v. Wasatch Med. Mgmt.*, 2005 UT App 430, ¶ 26, 124 P.3d 269 (emphasis added). “[A] breach is material if a party fails to perform an obligation that was important to fulfilling the purpose of the contract.” *Tooele Assocs. Ltd. P’ship v. Tooele City*, 2012 UT App 214, ¶ 18, 284 P.3d 709. Conversely, “a breach is not material if the party’s failure was minor and could be fixed without difficulty.” *Id.* While the materiality of a breach is usually a question of fact, if the facts are undisputed, it is a question of law. *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997). Here, the Harrisons at all times manifested their willingness to accept the Extension Payment without the inappropriate conditions imposed by NYA. Under these circumstances, the Harrisons’ objection to the August 31 Extension Payment—even if the Court determines those conditions were implicit to the REPC and did not modify it—could not have been a material breach of the REPC sufficient to excuse NYA’s further performance. Indeed, if the Court considers the Harrisons’ objection to the tender to be a breach (it was not), the breach was “minor” and not “important to fulfilling the purpose of the contract.” *Tooele Assocs. Ltd. P’ship*, 2012 UT App 214, ¶ 18. All NYA needed to do was withdraw its conditions and proceed under the REPC as the parties had been doing for nearly two years. Accordingly, the Court erred by determining that the Harrisons materially breached the REPC as a matter of law, excusing NYA’s further performance.

(R. 664-65.) This argument was timely raised in response to NYA’s argument that the Harrisons supposed breach excused NYA’s further performance under the contract. It was specifically raised, and substantial case law and analysis was included in the briefing. Accordingly, the district court had an adequate opportunity to consider and rule on the issue of the materiality, and the issue was preserved on appeal.

Even if the materiality argument was not adequately preserved, the district court's failure to consider materiality was plain error. "The plain error test requires 'the demonstration of error; a qualitative showing that the error was plain, manifest, or obvious to the trial court and evidence that the error affected the substantial rights of a party.'" *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 32, 208 P.3d 1077 quoting *IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, 2008 UT 73, ¶ 36, 196 P.3d 588. One of the stated elements of the first breach rule is that only material breaches excuse the other party's performance under a contract. *See Orlob v. Wasatch Medical Mgmt.*, 2005 UT App 430, ¶ 26, 124 P.3d 269 ("It is well-settled law that one party's breach excuses further performance by the non-breaching party *if the breach is material.*" (emphasis added)). Accordingly, even had the Harrisons not fully briefed the issue of materiality, the district court engaged in plain error when it ignored the materiality of the Harrisons' supposed breach. The result of this error was that the Court erroneously held that the Harrisons' immaterial breach of the REPC excused NYA's further performance under the REPC. This substantially affected the Harrisons' rights. Therefore reversal under a plain error standard is appropriate.

V. NYA DID NOT ELECT LIQUIDATED DAMAGES

NYA argues that it can recover liquidated damages even though it did not seek them in its Complaint and even though the plain language of the REPC required NYA to choose between liquidated damages and legal remedies. Specifically, the REPC permits the Buyer to "*either* accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages" *or* to "sue Seller" for specific enforcement of the contract or "pursue

other remedies available at law.” (REPC ¶ 16.) The language of the paragraph is *disjunctive*, not *conjunctive*. Nothing in paragraph 16 permits the Buyer to sue for liquidated damages. Rather, once the Buyer sues the Seller, it forecloses the option of demanding and receiving liquidated damages. NYA elected to pursue its remedies at law and is not entitled to liquidated damages under the plain language of the REPC. NYA apparently recognized this choice when drafting its Amended Complaint because it does not seek—or even mention—liquidated damages in its allegations or prayer for relief. (See R. 32-41.)

NYA argues that it should be permitted to pursue both liquidated damages and remedies at law simultaneously under the doctrine of election of remedies. However, the Utah Court of Appeals specifically rejected this argument under the same section of the standard form REPC applicable in this case. *McKeon v. Crump*, 2002 UT App 258, ¶ 12, 53 P.3d 494. In *McKeon*, the Utah Court of Appeals held that a nondefaulting Seller elected to retain the earnest money deposit and was therefore not entitled to actual damages. *Id.* ¶ 16 (holding that the “plain language” of paragraph 16 of the REPC “provides that the [nondefaulting party] must elect” either liquidated damages or lawsuit). Although NYA claims that a defaulting Seller should be treated differently under the REPC, it provides no principled reason for this distinction. Just as the plain language in paragraph 16 of the REPC requires the Seller to make an election to forgo liquidated damages before pursuing legal action, it also requires the Buyer to choose between making a “demand” for liquidated damages or bringing legal action. (REPC ¶ 16.) NYA never made such a demand here, and in fact pursued remedies at law several months

before August 31, 2009, the date the Court held that the Harrisons breached the contract by refusing NYA's conditional tender. By bringing legal action against the Harrisons, NYA elected to pursue its remedies at law and is not entitled to liquidated damages.

VI. THE DISTRICT COURT PROPERLY AWARDED ATTORNEY FEES

NYA claims the district court erred in awarding attorney fees because it did not allow NYA to recover for legal work that was not supported by a reasonably detailed description of the work performed. The district court has discretion to determine what constitutes "reasonable" attorney fees. *See, e.g., R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 20, 40 P.3d 1119 (holding that abuse of discretion is the appropriate standard of review for the reasonableness of attorney fees). A district court would abuse its discretion if it awarded fees that were not "based on the evidence and supported by findings of fact." *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998). Here, the district court properly "[made] an independent evaluation of the reasonableness of the requested fees," and determined that it could not evaluate the reasonableness of fees that were not described. *Id.*; *see also* R. 922.

The district court did not abuse its discretion by denying compensation for these requested fees because the description NYA provided is not a reasonably detailed description of the work performed and does not justify the reasonableness of the attorney fees sought as required by the Utah Rules of Civil Procedure and Utah law. Utah R. Civ. P. 73. Rule 73 provides that an affidavit of attorneys must include "(1) the basis for the award; (2) a reasonably detailed description of the time spent and work performed . . . ; [and] (3) factors showing the reasonableness of the fees." *Id.* A party can only recover

“reasonable” attorney fees. *See Foote*, 962 P.2d at 55. NYA provided only vague descriptions for the legal work performed. For instance, the Detail of Work Performed provided by Mr. Jeffs’ office lists “research” throughout without specifying what topics were researched. (*See, e.g.* R. 404-08.) The billing statements provided by Ray Quinney & Nebeker are similarly vague, listing, among other vague descriptions, a telephone call about “legal issues” on February 12, 2009, “contract issues” on March 11, 2009, and analysis of “contract issues” on April 2, 6, 7, 13, 2009. (R. 443, 447.) Accordingly, the district court did not abuse its discretion, when it excluded these fees from the award of attorney fees.

NYA also seeks attorney fees should the Court determine that it is entitled to pursue its liquidated damages claim and if it prevails on appeal. NYA should not receive its attorney fees because it should not prevail on appeal. Additionally, should the Harrisons prevail on appeal, they are entitled to their attorney fees on any matters on which they are the prevailing party. Finally, should the outcome of the appeal change the balance of which party is prevailing, the case should be remanded to the district court to decide which party is prevailing and evaluate and award reasonable attorney fees. *See RT Nielson Co.*, 2002 UT 11, ¶¶ 25, 28.

VII. THE DISTRICT COURT PROPERLY CALCULATED PREJUDGMENT INTEREST

If the district court correctly ruled that the Harrisons breached the REPC on August 31, 2009, the district court correctly awarded prejudgment interest from the date. *See Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶¶ 22-23, 82 P.3d 1064 (awarding

prejudgment interest from date of breach of contract); *Staker v. Hunington Cleveland Irr. Co.*, 664 P.2d 1188, 1191 (Utah 1983). Specifically, because the date of breach is the date that “the amount of [NYA’s] loss [was] fixed,” prejudgment interest accrued from that date. *Bjork v. April Indus.*, 560 P.2d 315, 317 (Utah 1977). In *Staker*, the district court awarded the plaintiff repayment for overpaid irrigation fees, and awarded prejudgment interest from the date the overpayment was established, not the date each overpayment was made. *Staker*, 664 P.2d at 1191.

NYA claims it is entitled to prejudgment interest as of the date of each Extension Payment, not the date of breach. In support, NYA cites *Anderson v. Doms*, 2003 UT App 241, ¶¶ 27-28, 75 P.3d 925. In *Anderson*, the Court awarded prejudgment interest on the amount of the earnest money, down payment, and taxes, that the purchaser of real property had made on a contract that was later rescinded. *Id.* ¶ 27. This makes sense in the context of a rescission claim because the goal of rescission is “to return parties to the status quo.” *Id.* ¶ 11. When a contract is rescinded, there is no date of breach. Rather, it is as if the contract never existed. In contrast, if the Harrisons breached the REPC, the amount of NYA’s loss was not fixed until the breach occurred. Accordingly, the Court should uphold the district court’s calculation of prejudgment interest from the date of breach rather than from the date of each Extension Payment.

CONCLUSION

For the forgoing reasons, the Court of Appeals should reverse the district court’s grant of summary judgment to NYA and denial of summary judgment to the Harrisons and remand the case to the district court for a determination of damages.

DATED this 7th day of July 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jason D. Boren", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellate Procedure 24(f)(1)(A), the undersigned hereby certifies that this brief contains 6,770 words, excluding the parts of the brief exempted by Utah Rule of Appellate Procedure 24(f)(1)(B).

A handwritten signature in black ink, appearing to read "J.D. Boren", written over a horizontal line.

JASON D. BOREN
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **BRIEF OF APPELLANT AND CROSS-APPELLEE** was served to the following this 7th day of July 2015, in the manner set forth below:

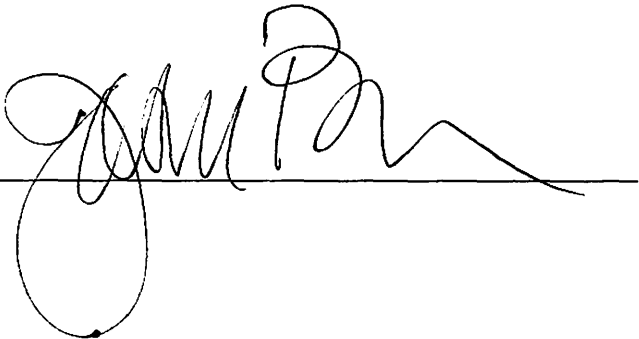
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